

BEFORE THE DEPARTMENT OF
NATURAL RESOURCES AND CONSERVATION
OF THE STATE OF MONTANA

* * * * *

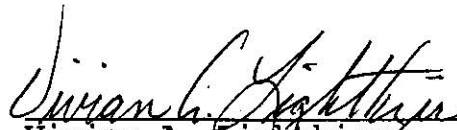
IN THE MATTER OF THE APPLICATION)	NOTICE
FOR CHANGE OF APPROPRIATION)	OF
WATER RIGHT G(W) 210737-40C BY)	ERRATA
CLIFFORD H. KLEMO)	

* * * * *

There is an error on page 5, Condition C, of the Proposal for Decision and page 2, Condition C, of the Final Order. A water right number was identified as Water Right 41C-W120700-00. It should have been Water Right 41C-W210700-00. Condition C should be as follows:

C. This authorization is, by agreement, subordinate to Water Right 41C-W210700-00 as well as any valid timely filed statement of claim in accordance with Mont. Code Ann. § 85-2-221(3)(i) (1995) and shall not be used to place a call on those water rights in Wisconsin Creek.

Dated this 26th day of September, 1996.


Vivian A. Lighthizer,
Hearing Examiner
Department of Natural Resources
and Conservation
P.O. Box 201601
Helena, Montana 59620-1601
(406) 444-6615

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing Notice of Errata was duly served upon all parties of record, first class mail, at their address or addresses this 26th day of September, 1996 as follows:

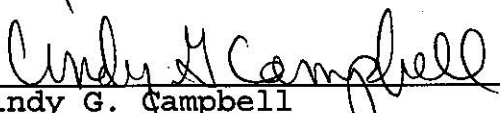
CASE # 210737

Clifford H. Klemo
3696 Hwy 287
Sheridan, MT 59749

Scott Compton, Manager
Bozeman Water Resources
Regional Office
151 Evergreen Dr. Suite C
Bozeman, MT 59715
(via electronic mail)

Russ McElyea
Moore, O'Connell, & Refling
P.O. Box 1288
Bozeman, MT 59771-1288

Beau Bradley
P.O. Box 286
Twin Bridges, MT 59754-0286


Cindy G. Campbell
Hearings Unit Legal Secretary

CASE # 210737

BEFORE THE DEPARTMENT OF
NATURAL RESOURCES AND CONSERVATION
OF THE STATE OF MONTANA

* * * * *

IN THE MATTER OF THE APPLICATION)	
FOR CHANGE OF APPROPRIATION WATER)	FINAL ORDER
RIGHT G(W)210737-41C BY CLIFFORD)	
H. KLEMO)	

* * * * *

The time period for filing exceptions, objections, or comments to the Proposal for Decision in this matter has expired. No timely written exceptions were received. Therefore, having given the matter full consideration, the Department of Natural Resources and Conservation hereby accepts and adopts the Findings of Fact and Conclusions of Law as contained in the May 13, 1996, Proposal for Decision, and incorporates them herein by reference.

WHEREFORE, based upon the record herein, the Department makes the following:

ORDER

Subject to the terms, conditions, restrictions, and limitations specified below, Authorization to Change Appropriation Water Right G(W)210737-41C is hereby granted to Clifford H. Klemo to change the point of diversion of Statement of Claim 41C-W210737-00 from the S $\frac{1}{2}$ NE $\frac{1}{4}$ NW $\frac{1}{4}$ to the SE $\frac{1}{2}$ NE $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 17 and to change the place of use from 118 acres in the NW $\frac{1}{4}$ of Section 18 to 41.8 acres in the N $\frac{1}{2}$ SW $\frac{1}{4}$ and 28.2 acres in the SE $\frac{1}{2}$ NW $\frac{1}{4}$ of Section 17, all in Township 4 South, Range 5 West, Madison County.

A. The approval of this change in no way is to be construed as recognition by the Department of the water rights involved. All rights are subject to possible modification under the proceedings

CASE # 210737

pursuant to Mont. Code Ann. Title 85, Chapter 2, Part 2 and § 85-2-404.

B. The issuance of this authorization by the Department shall not reduce the Appropriator's liability for damages caused by Appropriator's exercise of this authorization, nor does the Department in issuing the authorization in any way acknowledge liability for damage caused by the Appropriator's exercise of this authorization.

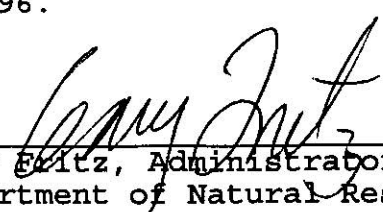
C. This authorization is, by agreement, subordinate to Water Right 41C-W120700-00 as well as any valid timely filed statement of claim in accordance with Mont. Code Ann. § 85-2-221(3)(i) (1995) and shall not be used to place a call on those water rights in Wisconsin Creek.

NOTICE

The Department's Final Order may be appealed in accordance with the Montana Administrative Procedure Act by filing a petition in the appropriate court within 30 days after service of the Final Order.

If a petition for judicial review is filed and a party to the proceeding elects to have a written transcription prepared as part of the record of the administrative hearing for certification to the reviewing district court, the requesting party must make arrangements with the Department of Natural Resources and Conservation for the ordering and payment of the written transcript. If no request is made, the Department will transmit a copy of the tape of the oral proceedings to the district court.

Dated this 27 day of June, 1996.



Gary Fritz, Administrator
Department of Natural Resources
and Conservation
Water Resources Division
P.O. Box 201601
Helena, Montana 59620-1601
(406) 444-6605

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing Final Order was duly served upon all parties of record, first class mail, at their address or addresses this 28th day of June, 1996 as follows:

Clifford H. Klemo
3696 Hwy 287
Sheridan, MT 59749

Beau Bradley
P.O. Box 286
Twin Bridges, MT 59754-0286

Scott Compton, Manager
Bozeman Water Resources
Regional Office
151 Evergreen Dr., Suite C
Bozeman, MT 59715
(via electronic mail)

Russ McElyea
Moore, O'Connell & Refling
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Bozeman, MT 59771-1288

Vivian A. Lighthizer,
Hearing Examiner
Department of Natural
Resources & Conservation
P.O. Box 201601
Helena, MT 59620-1601



Cindy G. Campbell
Hearings Unit Legal Secretary

BEFORE THE DEPARTMENT OF
NATURAL RESOURCES AND CONSERVATION
OF THE STATE OF MONTANA

* * * * *

IN THE MATTER OF THE APPLICATION)	PROPOSAL
FOR CHANGE OF APPROPRIATION WATER)	FOR
RIGHT G(W)210737-41C BY CLIFFORD)	DECISION
H. KLEMO)	

* * * * *

Applicant and Objector have reached an agreement and Objector has withdrawn his objections. However, Applicant is not relieved of the duty to present evidence to satisfy his substantive burden of proof when objections have been withdrawn.

The Hearing Examiner, having reviewed the record in this matter and being fully advised in the premises, does hereby make the following:

FINDINGS OF FACT

1. Application for Change of Appropriation Water Right G(W)210737-41C in the name of and signed by Clifford H. Klemo was filed with the Department of Natural Resources and Conservation (Department) on August 3, 1995.

2. Pertinent portions of the application were published in the *Madisonian*, a newspaper of general circulation in the area of the source, on November 9, 1995. Additionally, the Department served notice by first-class mail on individuals and public agencies which the Department determined might be interested in or affected by the application. One objection to the proposed change was received by the Department. Applicant was notified of the objection by a letter from the Department dated December 22, 1995.

CASE #210737

3. Applicant seeks to change the point of diversion and place of use of the water right claimed by Statement of Claim 41C-W210737. The point of diversion would be changed from the S~~1~~/~~2~~NE~~1~~/~~4~~NW~~1~~/~~4~~ to the SE~~1~~/~~4~~NE~~1~~/~~4~~NW~~1~~/~~4~~ of Section 17, Township 4 South, Range 5 West, Madison County.¹ The places of use would be changed from 118 acres in the NW~~1~~/~~4~~ of Section 18 to 41.8 acres in the N~~1~~/~~2~~SW~~1~~/~~4~~ and 28.2 acres in the SE~~1~~/~~4~~NW~~1~~/~~4~~ of Section 17. (Department file.)

4. Applicant has proven by a preponderance of evidence the proposed use will not adversely affect the water rights of other persons or other planned uses or developments for which a permit has been issued or for which water has been reserved. Applicant will be using the same volume on the same acreage that he has for the past 17 years. Applicant has agreed to subordinate his water right 41C-W210737-00 to Objector's water right 41C-W210700-00 and Applicant has agreed not to use Claim 41C-W210737-00 to place a call on any of Objector's water rights on Wisconsin Creek. (Settlement Agreement)

5. Applicant has proven by a preponderance of evidence the proposed diversion, construction, and operation of the appropriation works are adequate. Applicant moved this water right to the new point of diversion and place of use approximately 17 years ago without authorization from the Department. The instant application is to obtain authorization from the Department.

¹Unless otherwise stated all land descriptions are located in Township 4 South, Range 5 West, Madison County.

Although changing a water right without authorization is a misdemeanor and criminal sanctions may apply, the penalties authorized do not include denial of an authorization. Mont. Code Ann. §§ 85-2-122 and 46-18-212 (1995). The Department has no statutory authority to deny a change on such grounds. Moreover, whether the diversion works were first operated "illegally" is not relevant to how data from that operation serves to satisfy the criteria for issuance of a permit.

6. No objections relative to water quality were filed against this application nor were there any objections relative to the ability of a discharge permit holder to satisfy effluent limitations of his permit. (Department file.)

7. The proposed use of water, irrigation, is a beneficial use of water. Applicant will benefit from the use of this water by increasing production of crops which are directly related to his livelihood. (Department file.)

8. Applicant has proven by a preponderance of evidence that he has a possessory interest, or the written consent of the person with the possessory interest, in the property where the water is to be put to beneficial use. Applicant has written permission from the owners of the place of use to use the water on their property. (Department file.)

Based upon the foregoing Findings of Fact and upon the record in this matter, the Hearing Examiner makes the following:

CONCLUSIONS OF LAW

1. The Department gave proper notice of the hearing, and all substantive procedural requirements of law or rule have been fulfilled; therefore, the matter was properly before the Hearing Examiner. See Findings of Fact 1 and 2.

2. Applicant has met the criteria for issuance of an authorization to change appropriation water right. See Findings of Fact 3 through 8.

WHEREFORE, based upon the foregoing Findings of Fact and Conclusions of Law, the Hearing Examiner makes the following:

PROPOSED ORDER

Subject to the terms, conditions, restrictions, and limitations specified below, Authorization to Change Appropriation Water Right G(W)210737-41C is hereby granted to Clifford H. Klemo to change the point of diversion of Statement of Claim 41C-W210737-00 from the S~~1~~/~~4~~NE~~1~~/~~4~~NW~~1~~/~~4~~ to the SE~~1~~/~~4~~NE~~1~~/~~4~~NW~~1~~/~~4~~ of Section 17 and to change the place of use from 118 acres in the NW~~1~~/~~4~~ of Section 18 to 41.8 acres in the N~~1~~/~~4~~SW~~1~~/~~4~~ and 28.2 acres in the SE~~1~~/~~4~~NW~~1~~/~~4~~ of Section 17, all in Township 4 South, Range 5 West, Madison County.

A. The approval of this change in no way is to be construed as recognition by the Department of the water rights involved. All rights are subject to possible modification under the proceedings pursuant to Mont. Code Ann. Title 85, Chapter 2, Part 2 and § 85-2-404.

B. The issuance of this authorization by the Department shall not reduce the Appropriator's liability for damages caused by Appropriator's exercise of this authorization, nor does the Department in issuing the authorization in any way acknowledge liability for damage caused by the Appropriator's exercise of this authorization.

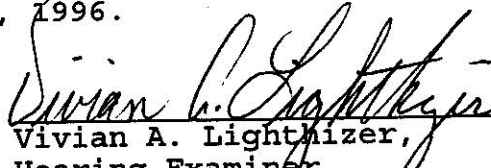
C. This authorization is, by agreement, subordinate to Water Right 41C-W120700-00 as well as any valid timely filed statement of claim in accordance with Mont. Code Ann. § 85-2-221(3)(i) (1995) and shall not be used to place a call on those water rights in Wisconsin Creek.

NOTICE

This proposal may be adopted as the Department's final decision unless timely exceptions are filed as described below. Any party adversely affected by this Proposal for Decision may file exceptions with the Hearing Examiner. The exceptions must be filed and served upon all parties within 20 days after the proposal is mailed. Parties may file responses to any exception filed by another party. The responses must be filed within 20 days after service of the exception and copies must be sent to all parties. No new evidence will be considered.

No final decision shall be made until after the expiration of the time period for filing exceptions, and due consideration of timely exceptions, responses, and briefs.

Dated this 13th day of May, 1996.


Vivian A. Lighthizer,
Hearing Examiner
Department of Natural Resources
and Conservation
P.O. Box 201601
Helena, Montana 59620-1601
(406) 444-6615

CERTIFICATE OF SERVICE


This is to certify that a true and correct copy of the foregoing Proposal for Decision was duly served upon all parties of record at their address or addresses this 13th day of May, 1996, as follows:

Clifford H. Klemo
3696 Hwy 287
Sheridan, MT 59749

Beau Bradley
P.O. Box 286
Twin Bridges, MT 59754-0286

Russ McElyea
Moore, O'Connell & Refling
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Scott Compton, Manager
Jan Mack, WRS
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(via electronic mail)


Cindy G. Campbell
Hearings Unit Legal Secretary